

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

YL CHESSMAN,

Petitioner and Appellant,

vs.

LEY O. TEETS, Warden, California  
ate Prison, San Quentin, California,

Respondent and Appellee.

APPELLANT'S CLOSING BRIEF

Appeal from an Order of the United States District Court,  
Northern District of California, Southern Division,  
by the Hon. Louis E. Goodman, District Judge,  
Discharging a Writ of Habeas Corpus  
and Remanding Petitioner to the  
Custody of Respondent.

GEORGE T. DAVIS  
ROSLIE S. ASHER  
98 Post Street  
San Francisco 4, California

Attorneys for Appellant, and

CARYL CHESSMAN  
Box 66565  
San Quentin, California

In Propria Persona

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## MISCELLANEOUS

Brien, "Fourth Cumulative Supplement to Manual  
of Federal Appellate Procedure," 3d Ed., 1948 13

NOTE

As in Appellant's Opening Brief:

The Transcript of Record from the District Court  
will be referred to as R. ---.

The Reporter's Transcript of the pre-trial proceedings  
(pre-trial record) will be referred to as PTR. ---.

The Reporter's Transcript of the hearings (hearing  
cord) will be referred to as HR. ---.

The Reporter's and Clerk's Transcripts on appeal to  
the California Supreme Court will be referred to as Rep.  
--- and Cl. Tr. ---.

The original exhibits before the District Court  
will be referred to as Pet. Ex. --- and Resp. Ex. ---.

Unless otherwise indicated, emphasis has been added  
appellant.



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APPELLANT'S CLOSING BRIEF

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PRELIMINARY STATEMENT

A full reply to Appellee's (Respondent's) Brief will be made under Argument, below, with one important exception requiring immediate notice.

Under Point I of his argument appellee warden, herein-after called respondent, asserts:

"The trial [District] court has held hearings and made findings on these issues [as ordered by the Supreme Court in Chessman v. Teets, 350 U.S. 3]. Appellant does not object to the propriety of the findings that there was no fraud or collusion by the prosecutor, substitute reporter or the court, or to the finding that the court reporter transcribed the deceased reporter's notes with fairness and competence." (Resp. Br. pp. 5-6.)

This statement is seriously misleading. It seemingly is calculated to convince this Court, in effect, that because, so respondent claims, appellant does not challenge



e District Court's findings as such, the appealed order  
y be affirmed without further consideration.

But appellant's procedural attack upon the order is  
en more fundamental than would be an attack upon the  
ndings.

It is this:

Appellant was unable to prove his charges conclusively  
cause the wrongful acts, conduct and rulings of the  
strict Court prevented him from doing so. Such being  
e case, the hearing itself was, and the findings based  
on it are, neither binding upon appellant nor determina-  
ve of the issues raised by the appeal. The hearing, in  
ort, was one in name only; accordingly, it patently is not  
e legal sufficiency of the findings but is the sufficiency  
the hearing itself that is fatally defective. This  
ct appellant made abundantly clear in his opening brief,  
t respondent has either failed or refused to perceive it.

(A second, non-procedural but, constitutionally, equally  
ndamental attack requiring a discharge from custody is  
sed upon established and undisputed facts of record.  
is attack deals with the procedure employed by the State  
urts in procuring, settling and using the trial record  
appeal and is presented first, under Points I and II,  
st below; Points I-A and B, App. Op. Br.)

Respondent in his brief finds no fault with or error  
appellant's "Statement of the Case and the Facts" as



and in the opening brief (pp. 2-11). However, to  
stify his own highly selective and greatly truncated  
sion of the case and the facts, respondent asserts  
fatorily:

"Since petitioner has not attacked the suffi-  
ciency of the findings of fact, no detailed summary  
of the evidence produced at the trial [hearing]  
will be made." (Resp. Br., Statement of Facts,  
p. 3.)

This claim that the facts need only be sketchily  
sidered has been disposed of just above. It is not  
rect. All the facts set out in Appellant's Opening  
Brief are most essential to a proper determination of the  
eal.

Because of the importance and complexity of the mat-  
ters in issue, because eight years of litigation and  
erally thousands of pages of documents and court records  
involved, and because respondent has elected baldly  
advance incompetent claims that take only a few lines  
make but often require a page or more to refute, this  
sing (reply) brief necessarily will run more than 20  
es. Accordingly, as required by Rule 2(e), Rules of  
s Court, because of its greater length, leave is hereby  
pectfully sought to file it.

Appellant's answering argument follows.



I APPELLANT WAS NOT PERMITTED TO ESTABLISH INADEQUACIES AND OMISSIONS IN THE DISPUTED REPORTER'S TRANSCRIPT, WAS NOT PERMITTED TO BE PRESENT OR REPRESENTED BY COUNSEL AT THE TIME OF ITS SETTLEMENT (OR AT ANY TIME), AND WAS NOT PERMITTED TO PRODUCE WITNESSES OR TO TEST THE ABILITY OF THE SUBSTITUTE REPORTER TO TRANSCRIBE THE DEAD REPORTER'S NOTES.

(App. Op. Br. pp. 15-19)

(Resp. Br. ???)

Respondent does not, and appellant believes cannot, challenge directly either the law or the facts set out under this point in Appellant's Opening Brief.

Rather, passing that law and those facts, respondent argues at length that the procedure used to prepare and settle the record has been adjudicated as constitutional, and not therefore be readjudicated, and that this contested procedure is not violative of either constitutional due process or equal protection of the law.

This argument will be answered under Point II, just now. Once examined, it will be seen to leave appellant's original contention, as presented under Points I-A and B in the opening brief, in full force. In fact, respondent's approach to the point serves to emphasize the validity of appellant's claim.



II THE COURTS OF CALIFORNIA DENIED TO APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN ORDERING PREPARED, SETTLING, AND ACCEPTING FOR USE ON APPEAL SUCH A REPORTER'S TRANSCRIPT OF THE TRIAL PROCEEDINGS, USED AS A BASIS FOR AFFIRMING THE DEATH AND OTHER JUDGMENTS, WITHOUT GIVING APPELLANT ANY OPPORTUNITY TO DEFEND AGAINST THAT TRANSCRIPT.

(App. Op. Br., Point I-B, pp. 19-25)

(Resp. Br., Point II, pp. 6-13)

Without regard for the facts and the law upon which this point is based, respondent interposes what he terms to be "answers" to appellant's contention. These will be considered and refuted in the order respondent has presented them.

A. THE QUESTION OF THE CONSTITUTIONALITY OF THE DISPUTED PROCEDURE USED TO PREPARE AND SETTLE THE RECORD MAY AND SHOULD BE DECIDED ON THIS APPEAL.

Respondent initially argues that "The constitutionality of the procedures used to settle the record has not been adjudicated," and that "Policy demands an end to litigation." (Resp. Br. p. 7.)

First. "Policy," however, of whatever kind or variety, makes no demand for a wrongful, unjust or unconstitutional end to litigation. Further, this litigation can be ended more effectively by squarely deciding the question on its merits than by refusing to decide it.

Second. Decisions in habeas corpus from State courts are not res judicata. (Brown v. Allen, 344 U.S. 443, 457,



; see Price v. Johnston, 334 U.S. 266, 291; dissenting opinion of Judge Stephens in Price v. Johnston, 161 F.2d 161.) Where the ends of justice will be served by a successive inquiry, 28 USC § 2244 specifically authorizes the judge or court to make such an inquiry, and the Supreme Court has expressly so held (Brown v. Allen, supra, 508).

Third. Chief Judge William Denman of this Court considered the point so important that, in granting the required certificate of probable cause to appeal, he deleted virtually all of his strongly-worded opinion in support of the awarding of that certificate to consideration of the point, emphasizing he believed it did definitely present a justiciable jurisdictional question under the Thirteenth Amendment. (See R. 252-254.)

Fourth. As further evidence of the public importance of the question, on June 28, 1956, at the regular yearly conference of the judges of this circuit, 50 of 51 of those participating joined in a resolution authorizing a study of the Chessman case to produce recommendations that would prevent a similar development in Federal criminal cases and further urged legislation by Congress that would empower Federal judges to grant a new trial should the court reporter die, become disabled, or his notes be lost or destroyed during criminal proceedings.

Fifth. The point has never been squarely decided by Federal courts on the merits and on all the facts.



is the first time all the State court records in the  
have been before this Court, or, with the exception  
he court below, before any Federal (or State) court.

More than Chessman v. Teets, 221 F.2d 276, 278, de-  
s the question, it simply announces mistaken reasons  
fragmented parts of it should not be decided.

Further, this decision was reversed by the Supreme  
t on certiorari (Chessman v. Teets, 350 U.S. 3), and  
akes tortured reasoning to say, as respondent unex-  
edly does, that the Supreme Court "impliedly adjudic-  
d [and rejected] this issue by ordering a hearing  
ly on the question of fraud and collusion in the  
lement of the record." The former point was and is  
essarily embraced in the latter.

Moreover, the instant petition for the writ, raising  
points, was filed in the District Court only after  
Supreme Court had denied certiorari to the California  
reme Court (where an almost identical petition was  
ught up for review, In re Chessman, Crim. 5632) "without  
judice to an application for a writ of habeas corpus  
an appropriate United States District Court." (Chessman  
Teets, 348 U.S. 864.)

Hence, the Supreme Court has held that the point pre-  
s a justiciable question, and respondent's unwarranted  
im--"Of course, the United States Supreme Court likewise  
liedly approved the procedure used in prior decisions"--



absolutely not true, for this is the only prior decision there is. In all certiorari proceedings in the case prior that (i.e., Chessman v. California: 340 U.S. 840, 341 U.S. 929, 343 U.S. 915, and 346 U.S. 916), the Supreme Court refused to review, and it is well settled that such usals import no opinion on the merits. (Brown v. Allen, U.S. 443, 490-491, 497, and cases cited.)

Respondent also says that "The question was expressly raised in the case of People v. Chessman, 35 Cal.2d 455," "The Supreme Court denied certiorari. (340 U.S. 840.)" This is no more than another of respondent's ill-considered representations.

Chessman v. California, 340 U.S. 840, was not a certiorari proceeding seeking review of People v. Chessman, Cal.2d 455. Rather, review was sought of a petition writ of habeas corpus filed as an aid of appellate jurisdiction and summarily denied by the California Supreme Court (In re Chessman, Crim. 5110). Since appellant then had not exhausted his state remedies and the review was premature, the Supreme Court could not then have reached the merits on certiorari had it wanted to. USC § 2254.)

B. THIS INVENTED AND MAKESHIFT PROCEDURE DENIED APPELLANT DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Respondent next argues that "The procedures used by



State did not deny appellant due process or equal protection of the law." (Resp. Br. p. 7.)

In support of his claim, after fatally conceding "appellate procedures must not be discriminatory," respondent declares that "The procedure for the settlement a record where a court reporter dies before transcribing notes was set out in People v. Chessman, 35 Cal.2d 455. was and is the law of California. This procedure was reasonable, and in no way discriminatory as to Chessman." (phasis respondent's.)

This is a badly ill-advised and completely incorrect statement. The procedure employed in preparing and settling transcript positively was not the law of California. Further, in accepting the transcript while denying appellant a hearing at which he might test its validity and adequacy, California Supreme Court conceded that the transcript prepared in a situation for which the Rules on Appeal do not expressly [or even impliedly] provide" (p. 458 of 35 Cal.2d). It should be kept in mind that the trial court directed its preparation, not by any known law or rule, since none existed, but by "human ingenuity," to fit his own words of record. From beginning to end, the methods employed were ad hoc and makeshift.

What might happen should another court reporter die before transcribing his notes in a capital case in this state is anyone's guess. Certainly People v. Chessman,



al. 2d 455, doesn't put the question at rest. Further, type of appeal to be accorded a condemned appellant fixed by the State Constitution and its Penal Code (see Op. Br. pp. 15-16) and the power to make implementing s governing appeals is vested in the State's Judicial cil, not its Supreme Court (Const. of Calif., Art. VI, ; Calif. Pen. Code, § 1247k).

Finally, respondent's argument seems to boil down to : because the State did produced, settle and use a record orts on appeal, rather than no record at all, appellant ask and due process and equal protection may demand no .

What respondent is necessarily saying, under the sputed facts of this case, is that it is all right to uce a record by "human ingenuity," in contravention of established, controlling and settled State law; to gate, not to some impartial party, but to the prose- r, the unsupervised authority to select a substitute rter to prepare such a record of the trial proceedings; et the prosecutor select his own uncle-in-law, and keep fact carefully concealed from the trial judge, the llant and the reviewing court; to let the prosecutor the substitute reporter consult on the transcription of court; to grant the substitute reporter unlimited to prepare the record; to let him talk to detectives-- trial witnesses for the prosecution--out of court,



ng these talks as a basis for preparing a transcription  
their testimony, at the suggestion of the prosecutor,  
keep this fact from the trial judge, the appellant,  
the reviewing court; to let the substitute reporter  
pare the transcript in rough draft form, the rough  
ft never being seen by the trial court or appellant,  
ough appellant formally had asked to be furnished a  
, and then, also out of court, to permit the prosecutor  
"check" the draft before it was copied in final form;  
let the prosecutor swear to the reviewing court that  
ellant (representing himself and held at a State prison)  
ld be produced in court when the record was settled and  
er let the trial judge know of this sworn statement; to  
the reporter more than three times the statutory fee  
his work; to hold hearings on the settlement of the  
ord with neither appellant nor counsel representing him  
sent; to have appellant's motions to be present and  
llenge the transcript and the ability of the substitute  
porter to transcribe the dead reporter's notes denied by  
reviewing court without prejudice and ignored by the  
al court; in the absence of appellant to proceed to  
e witnesses testify and settle the transcript; to have  
trial judge "approve" such a record without testing the  
petence of the substitute reporter to decipher the dead  
orter's notes, although the trial judge knew the local  
erior Court Reporters' Association officially had gone



record that other court reporters had examined the notes found them to be indecipherable in material part; to e this disputed record accepted by the reviewing court used as a basis for affirming death and other judgments, hough it was not certified to be complete and correct required, but only correct to the best of the substi- e reporter's ability; and to never allow appellant to end against the use of that transcript or to establish, he claimed, that missing from it, or garbled in the nscription of it, were sections in which it should have irmatively appeared that appellant had been convicted violation of fundamental constitutional rights.

This, to say the least, is a singular definition of process and equal protection of the law. (See cases ed, contra, App. Op. Br. pp. 20-24.)

As stated by the late Mr. Justice Jackson in a separate nion in Brown v. Allen, 344 U.S. 443, at 546: "But I w of no way that we can have equal justice under law ept we have some law." The use of "human ingenuity," the prosecutor, whose avowed purpose was to see appellet executed, is certainly no substitute for law.

The Fourteenth Amendment does not permit a State to y equal protection of its laws because such denial is wholesale. (See concurring opinion of Mr. Justice nbfurter in Snowden v. Hughes, 321 U.S. 1, 15-16.)

Contrary to respondent's claim, independent research



a study of the texts and other references cited by respondent does not disclose a single instance where, in each case, the record has been prepared by the unique disputed means employed in this case. Moreover, we are dealing with a situation where an appeal is mandatory, rather than being merely discretionary or a matter of grace. Argument flowing from discarded methods of preparing appellate records under wholly dissimilar facts and is hardly persuasive or determinative of any issue raised here.

Here the relevant facts, all of record, are not in dispute, whatever interpretation or misinterpretation the District Court and respondent may have placed upon them, or even both may have wed them to unrelated and disputed facts, and when such is the case "the appellate court is free to consider them and to reach its own conclusion unmolested by the District Court's findings and conclusions of law." (O'Brien, "Fourth Cumulative Supplement to Manual of Federal Appellate Procedure," p. 70, 3d Ed., 1948.)

Neither is this Court bound by decisions or findings of the State courts. Since the California Supreme Court acting within its jurisdiction, whether as a matter of State law it decided the question of the validity and accuracy of the transcript correctly or incorrectly, its decision finally decides the question and defines appellant's rights under State law (Hebert v. Louisiana, 272



S. 312, 316.) But the Supreme Court (and Circuit Court) has constitutional power to inquire whether the state law, as construed and applied, has afforded appellant due process and equal protection of the law (Hebert Louisiana, *supra*; Buchalter v. New York, 319 U.S. 427, 9); and such an inquiry and decision cannot be foreclosed by the prior finding of the State court; the Federal Court will independently examine the facts and reach its conclusion (Norris v. Alabama, 294 U.S. 587, 590; Even & Allison Co. v. Evatt, 324 U.S. 652, 659; Niemotko Maryland, 340 U.S. 268, 271).

As decisively held by the Supreme Court in the recent case of Reece v. Georgia, 100 L.Ed.(Adv.Ops.) 109, 112:

"We have jurisdiction to consider all the substantial federal questions determined in the earlier stages of the litigation (citation), and our right to re-examine such questions is not affected by a ruling that the first decision of the state court became the law of the case. (Citation.)"

C. THE RECORD AFFIRMATIVELY ESTABLISHES THAT APPELLANT HAS NOT WAIVED, BUT HAS VIGOROUSLY AND CONSISTENTLY ASSERTED, HIS RIGHT TO BE PRESENT (OR REPRESENTED BY COUNSEL) IN THE STATE TRIAL COURT AT THE TIME THE RECORD WAS SETTLED.

Respondent claims that "Any alleged denial of due process by virtue of the fact that appellant was not present at the settlement of the record in the State court has been waived." (Resp. Br. p. 13.)

An examination of the facts appearing affirmatively



record reveals conclusively that appellant did not  
have his right to be present at the time the transcript  
settled. On the contrary, he expressly sought to be  
present, and it will be shown that he had a clear consti-  
tutional right to be present and, at his option, to be  
represented by counsel.

At the outset it may be conceded that if the disputed  
script had been prepared in accordance with the rules  
statutes governing appeals appellant would have had no  
right personally to be present at the time of its settle-  
ment. But it was not so prepared; the means employed were  
wholly unknown to the law, as shown. If the  
e could claim the right to so proceed, permitting the  
script to be prepared under the direction of the pro-  
tector, and by his own uncle-in-law, it must concede  
that appellant had the right, which was denied him, to test  
transcript's validity and adequacy.

Appellant could only have done so at the time of its  
settlement (or at a subsequently ordered State court hear-  
, for appellant's attempt in the California Supreme  
Court to prohibit preparation had failed when the prose-  
cutor had sworn to that court appellant would be present  
personally allowed to participate in its settlement  
in the superior court. Appellant then was representing  
himself, and had the unquestioned right to do so (Carter  
Illinois, 329 U.S. 173, 174). He was being held at



Quentin and his motion to the State Supreme Court to  
er his production at the settlement proceedings in the  
erior court was denied without prejudice (doubtless  
ause that court believed the superior court would order  
ellant produced, since the prosecutor had sworn it would).

Appellant, however, was not produced; his motion to  
present, question hostile witnesses, test the ability  
the substitute reporter to transcribe the notes, chal-  
ge the validity of the methods employed in preparing  
transcript and establish prejudicial inaccuracies and  
ssions in that transcript was simply ignored by the trial  
ge, who proceeded to hold hearings, permit witnesses to  
called and examined, settle the transcript, "approve"  
and order it transmitted to the State Supreme Court --  
in the absence of appellant or counsel acting in  
ellant's behalf.

In deciding mesne proceedings then instituted by  
ellant, the California Supreme Court, although placing  
burden of proving the prejudicial inadequacy of the  
quely prepared record on appellant, denied appellant's  
tion for hearings in the superior court at which he might  
just this, and without more accepted the transcript for  
s on appeal (People v. Chessman, 35 Cal.2d 455).

Since "Neither the historic conception of Due Process  
the vitality it derives from progressive standards of  
utice denies a person the right to defend himself,"



ther does it deny him the right to defend against  
h a transcript. (Carter v. Illinois, supra, at 175.)

Where the accused is defending himself, the trial  
ge must be particularly alert to see that the accused  
not overreached and taken advantage of (Gibbs v. Burke,  
U.S. 773, 781). But here, by not producing appellant  
offering him counsel when the record was settled, the  
al judge himself was the person responsible for appellee  
t being overreached and taken advantage of.

The essential elements of due process of law are  
ice and adequate opportunity to defend (Louisville, etc.,  
Co. v. Schmidt, 177 U.S. 230, 236; Simon v. Craft, 182  
. 427, 436). Yet appellant was never allowed to defend  
inst the transcript, either in person or through counsel.

While the State Supreme Court offered to appoint  
nsel for appellant to argue the mesne proceedings be-  
e it, the superior court never offered appellant counsel  
the time the record was settled, although appellant  
er waived his right to counsel. He had no occasion to  
so, since up until the time hearings on the settlement  
an, appellant believed he would be produced and allowed  
participate personally in those proceedings.

A waiver of counsel in a capital case is not compe-  
x when it is involuntarily and negatively brought about  
arbitrary, extrinsic causes. To be effective, "it must  
intelligently, competently, understandingly and volun-



II APPELLANT WAS DENIED A FULL AND FAIR HEARING BY THE DISTRICT COURT.

A. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO SUBPOENA OR ORDER THE DEPOSITIONS TAKEN OF WITNESSES WHOSE TESTIMONY WAS MATERIAL, COMPETENT AND RELEVANT; THIS ALTERNATIVE COURT PROCESS WAS FIRST SOUGHT LONG BEFORE, NOT AFTER, THE HEARINGS GOT UNDERWAY.

(App. Op. Br. pp. 24-26)

(Resp. Br., Point III-A, pp. 16-17)

If, as respondent says, "It should appear clear that District Court had no power to issue subpoenas for production of witnesses," then a more persuasive reason why the District Court should have allowed depositions to be taken could not be presented. But that court refused either to order the production (or, with one exception, even request the production) of witnesses whose testimony was vital, or to permit depositions to be taken.

The result was that appellant was foreclosed by any and every means from getting most of his evidence before the court. Respondent does not dispute appellant's showing in the opening brief but, rather, seeks to get around it in a gross misrepresentation of the facts.

Respondent would have this Court believe appellant waited until four days after the hearings had begun to seek depositions or have subpoenas issued, and that this was the only such attempt made. Actually, however, this



the next to last of repeated attempts to secure such alternative court process, as the record clearly shows. All before the hearings started appellant's counsel even used the possibility of moving the place of hearing to Angeles, if no other way was open to secure vital testimonial evidence (PTR. 209 et seq.).

On January 9, 1956, appellant sought without success secure the immediate production of relevant public records (R. 146-148). On that same date appellant filed "Petitioner's Witness List and Application for Court-ordered Issuance of subpoenas" (R. 151-153). This application was denied without prejudice (R. 157).

Even before that and on the first day the case was assigned to Judge Goodman, which was November 30, 1955, appellant's counsel took this matter up with the court. It was again taken up on December 30, 1955 (see PTR. 209-), and the court stated: "I think there is some provision in the statute for bringing [in] witnesses from outside the district," but did not identify the provision. Again on January 9, 1956, appellant's counsel argued at length, but vainly, for the issuance of court-ordered subpoenas (PTR. 242-252).

Having made every effort prior to the hearings for process to produce his witnesses and failed, appellant filed his "Motion for Order for Issuance of Subpoenas Process for the Taking of Depositions" on January 19,



6 (R. 167), with supporting affidavit (R. 160-166).  
s motion, too, was denied (R. 215; HR. 511). Last,  
January 24, 1956, appellant filed his motion for  
claration of rights (R. 168-169), with supporting  
ibits (R. 170-197) and affidavits (R. 198-203), by  
ch he sought, among other things, to be able to pay  
costs of producing his witnesses (R. 201-202). The  
lication was summarily denied (HR. 916).

B. THE DISTRICT COURT KEPT APPELLANT FROM  
PROVING HIS CHARGES.

(App. Op. Br. pp. 26-31)

(Resp. Br., Point III-B, pp. 17-20)

(1) Here respondent argues that black is white. The  
ord does show that the District Court did refuse to  
mit the accuracy of the transcript as prepared by the  
stitute reporter to be tested, and that the District  
rt, further, did refuse to permit the all-important  
stion of the decipherability of the notes to be resolved.

Stanley Fraser, the substitute reporter, was the first  
ness called (not counting various witnesses who brought  
rt records for identification). Almost at the outset  
counsel for appellant's interrogation of Fraser, the  
istrict Court told counsel flatly it was not going to  
ow the accuracy of the transcript or the ability of  
er to transcribe the notes to be tested. The court,  
act, was so bluntly emphatic that it went so far as to



te that it didn't intend to permit either, whether  
Supreme Court had intended it to do so or not. The  
trict Court added that Fraser "could have been the  
t incompetent reporter in the world and he could have  
e a mess of the transcript," and the "transcript could  
75 percent wrong, and it wouldn't raise any federal  
stion." (HR. 248-250.)

What could be clearer? How could appellant object  
the exclusion of evidence when, at the outset, the  
rt announced it wouldn't even allow the subject to be  
sidered? Respondent's argument is incredible in the  
nt of the record.

As well, the gratuitous speculation in Respondent's  
ef as to why appellant did not have his expert witness  
tify is refuted by the record. The reason this witness  
not testify is very simple: appellant exhausted his  
is and credit before the hearings began, was thereafter  
elled to proceed in forma pauperis, and the expert  
ined to testify unless he was paid in advance for his  
ert testimony (R. 198, 201).

Equally gratuitous and unwarranted is the inference  
ondent would have this Court draw from counsel for  
ellant's statement regarding the many errors this ex-  
r had found. These errors dealt largely with omissions  
s shown against the transcript): that is, with places  
he notes where whole sets of symbols, line after line



them, had been left untranscribed, or where words and  
ences had been supplied in the transcript for wholly  
tered or missing notes, and rather than raising any  
umption that the notes could be transcribed, they  
ctively refute such a presumption (see R. 199-201).

It is true that "Petitioner did not avail himself  
the] offer" of the District Court "to put the substi-  
court reporter in his chambers in order to permit  
to work on the transcription of a page of the original  
s." An examination of the circumstances leading up  
his offer, as disclosed by the record, immediately  
als why: under the conditions imposed, the test would  
proved or decided nothing. (See HR. 285-292.)

(2) Respondent misses the point entirely. He asserts:  
[District Court] was correct in ruling that any mis-  
ement made as to the place of the delivery of the  
script was immaterial."

The place of delivery, *per se*, may have been rela-  
ely unimportant; but the sworn misrepresentation by  
prosecutor to the effect that appellant would have  
transcript delivered to him in court at the time of  
settlement was crucially important. This false state-  
, made under oath to the California Supreme Court,  
lted first in that court permitting preparation of the  
script to go ahead when appellant sought a writ of  
ibition to halt preparation. It resulted, next, in



court denying without prejudice appellant's motion  
an order requiring his production in the superior  
court at the time the record was settled, since that court  
had been told under oath by the prosecutor, an officer  
of the superior court, that the superior court would  
not produce appellant. But appellant wasn't produced; his  
name to be produced was ignored by the trial judge, and  
the record was settled, with the prosecutor actively par-  
ticipating in the proceedings, in the absence of appellant  
and anyone representing him. And the prosecutor never told  
the trial judge, then or ever, of this false statement.

He was content, rather, to benefit by his own wrong.

Had the prosecutor either not made such a false  
statement under oath, or had he told the trial judge of  
the course of the proceedings and the end result un-  
doubtedly would have been entirely different. The harm  
caused by it and the prosecutor's significant silence with  
respect to it was incalculable. Judicial sanction of  
false swearing puts a premium upon trickery.

Respondent claims that the prosecutor "did answer  
a question [as to this affidavit] later in the proceed-  
ings in the District Court. But all the prosecutor did  
not seek to excuse and minimize what he had done by claim-  
ing he had been mistaken about what the rules required  
(543), and appellant's counsel was not permitted to  
follow through in the examination and show the grave preju-



suffered. Further, the District Court earlier had  
n occasion to comment that comments of the prosecutor  
t nothing because they were simply the statements by  
torney in a case.

Yet here the prosecutor was far more than that. He  
the agent of the State - the person designated by the  
l judge to find a reporter to undertake to transcribe  
dead reporter's notes - the individual who, acting  
r color of this authority, selected his own uncle-in-  
- the one who negotiated the special contract with  
Board of Supervisors at three times the statutory  
for his uncle-in-law, who sought all the extensions  
ime for preparation his uncle-in-law claimed to need,  
directed the preparation, who checked the "rough draft"  
he transcript, and who offered it to the trial court  
filing, etc.

(3) What marvelous kind of Alice-in-Wonderland double-  
is that which is found in the first paragraph on page  
f Respondent's Brief? In the first place, it is not  
llant's contention, as respondent too nicely and con-  
ently claims, that the court refused to let him "offer"  
records into evidence, once they were in court, but that  
court went far further and refused to order the produc-  
of these records and thus kept their contents from it-  
and this Court on appeal. And how, in the name of  
on, may records be produced unless, when they are other-



unavailable, their production is ordered by the court? These hospital records and arrest reports (and police ) were highly relevant to the issue of fraud and cor- ion in the case. This is so obvious that appellant is tled by respondent's claim to the contrary.

After the record had been settled and "approved" by trial court, the California Supreme Court subsequently, ppellant's motion, ordered the prosecutor's opening ess and the voir dire examination of prospective jurors d to the record before it. Fraser was engaged in pre- ng this portion of the record between July, 1950 and ary, 1951. In his petition, among other times, appel- alleged Fraser had been arrested for drunkenness on ber 21, 1950 (R. 11), which was while Fraser was sup- illy actually engaged in preparing the record.

Appellant should have been allowed to question Fraser, uce records and establish this fact. Appellant, as , should have been allowed to call Mrs. Eva Hoffman stablish that Fraser was excessively intoxicated while as attempting to transcribe the notes, was arrested than once during this period, etc. (R. 162).

Appellant, further, by the production of these records by the questioning of Fraser, as well as by corroborat- testimonial evidence, should have been allowed to e Fraser had misrepresented his ability and was in mentally and physically incompetent to transcribe



notes, as alleged (R. 10), because of his excessive of and long-standing and continued addiction to alcoholic beverages, with its inevitable brain damage, which terminated in 1953 in an attempt at suicide, hallucinations, were delirium tremens, and lengthy hospitalization (see 150, 162-163, items 4 & 5).

C. THE DISTRICT COURT DENIED APPELLANT ADEQUATE TIME AND OPPORTUNITY TO PREPARE.

(App. Op. Br. pp. 31-35)

(Resp. Br., Point III-C, pp. 20-22)

Appellant's Opening Brief and the uncontradicted parts of record present a decisive answer to respondent's claim that "The court was most liberal in granting time to the petitioner in which to prepare for trial."

In the first place, time without opportunity to prepare is meaningless (Adams v. U.S. ex rel. McCann, 317 U.S. 279), and the record shows without contradiction that the conditions under which appellant was obliged to prepare and consult with counsel at San Quentin were prohibitive. Such conditions were made the subject of affidavits filed in support of various motions for relief, and are part of the record. Not one counter-affidavit was filed. To explain this failure on his part, respondent offers the defense that "Most of these [pre-hearing] proceedings were without notice and due to the shortness of time counter-



idavits were unable to be prepared."

There are four answers which conclusively repudiate s claim: (1) In each case respondent's counsel, being ved copies of all papers filed, were notified of, eared at and participated actively in the proceedings. a single pre-trial hearing was held in the absence respondent's counsel. (2) Respondent's counsel did once request a delay of any pre-trial hearing or ask time in which to file counter-affidavits. (3) The ord discloses that respondent did have ample time to e any counter-affidavits he desired. In one instance econd motion for a transfer of custody was put over a k (R. 85). (4) When respondent testified at his own uest (PTR. 149-176), he did not deny in any substantial ticular the facts alleged in the affidavits; on the trary, his stated purpose in testifying was to justify condemned actions, orders and treatment of appellant, to seek a change of custody for appellant (see respond- s motion at conclusion of his testimony: R. 176).

Respondent does not and cannot dispute that, at the son prior to the hearings, all of appellant's legal ers were examined and their contents ascertained, or that ellant's person and effects were searched daily, often n than once, or that conversations between appellant his counsel were listened to, or that all the other legations relating to this matter were not correct.



Further, since respondent was never personally present during consultations between appellant, appellant's counsel and others, or when appellant was searched, his testimony was hearsay. Had he wanted to rebut appellant's affidavits, he was free to produce as witnesses his agents the guards but chose not to do so.

The District Court's offer to transfer appellant to Alcatraz may have been "unprecedented" but had appellant accepted it blindly he would have found himself in an impossible position. Respondent elects to ignore the affidavit of George Davis, appellant's counsel, showing it to be true. Further, appellant did accept the offer only asked that the conditions offered be spelled out, which the court refused to do. (See R. 123-124, 125, 128-130-131, 132-139.)

Appellant did--and still does--want an early, fair decisive hearing on these charges. When his counsel met this on November 30, 1955, he naturally assumed he would be able to produce witnesses or take their depositions, have access to relevant public records, and have a reasonable opportunity to prepare. This didn't prove to be the conditions that obtained, however.

After noting that the petition originally was filed December, 1954, respondent observes that the petition contains a statement that "said persons [i.e., witnesses in support of the charges] have stated that they are willing



testify to facts germane to this matter under oath  
suant to subpoena." This is true but it certainly does  
aid respondent, since it affirmatively appears under  
division A of this point that appellant was never able  
subpoena these witnesses, to take their depositions,  
get vital records produced.

D. THE DISTRICT COURT POSSESSED THE STATU-  
TORY AUTHORITY TO ORDER THE SHORTHAND  
NOTES PHOTOSTATED AND FURNISHED APPEL-  
LANT WITHOUT PREPAYMENT OF COSTS; ITS  
REFUSAL TO DO SO HAMPERED APPELLANT IN  
PROVING HIS CHARGES.

(App. Op. Br. pp. 46-27)

(Resp. Br., Point III-D, pp. 22-23)

Respondent's claim that 28 USC § 2250 was intended  
apply only to records and documents "of the trial court  
re the trial court was a federal court" is fantasy,  
fact. It applies to precisely what it says it applies:  
records and documents on file in the office of any Clerk  
the United States.

The shorthand notes were on file with the District  
rt Clerk. They were a crucial part of the record both  
he State courts and in the District Court, and were  
ferred as exhibits at the first opportunity when the  
ings, which centered around them, began.

The notes were impounded on December 16. The hearings  
then scheduled to begin on January 9. Appellant's  
prt, as soon as they were available, immediately began



study them. They were available only at the clerk's office and when that office was open, which gave appellant's expert only some 15 days in which to work. Appellant had only a limited amount of funds. If he had paid \$300 to \$400 required to have the notes photostated would have been unable to pay his expert. As it was, funds were soon exhausted and he was compelled to proceed in forma pauperis.

Too, appellant was running out of time. His expert not able to complete his study of the notes, around the entire proceeding centered, unless they were available at nights and on weekends (see PTR. 262-263). Appellant in consequence immediately asked to have the notes photostated and furnished him without cost under SC § 2250.

The District Court had unquestionable power under section to order the notes photostated and furnished appellant without charge to him. It prejudicially abused discretion in refusing to do so.

V THE DISTRICT COURT HAD BOTH THE POWER AND DUTY TO REFUSE TO ALLOW J. MILLER LEAVY TO APPEAR AS CO-COUNSEL FOR RESPONDENT; IT SHOULD HAVE DONE SO.

(App. Op. Br. pp. 35-38)

(Resp. Br., Point IV, pp. 23-24)

Contrary to respondent's claim, J. Miller Leavy was 'the statutorily designated counsel for the warden.'



Attorney General of the State was (Calif. Gov't Code, 511). When (under circumstances not applicable here) strict attorney represents, or acts on behalf of, the warden of a State prison, it is always the district attorney of the county in which the prison is located (see, e.g., s. f. Pen. Code, §§ 1475, 3701-3702). San Quentin is in Marin County. J. Miller Leavy is a deputy district attorney of Los Angeles County.

Respondent has not quoted all of Section 12550 of California Government Code. That section further provides:

" . . . When he [the Attorney General] deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process."

Thus, the section is not authority at all for the claim that the Attorney General has the mandatory power by State law to compel a district attorney or his deputy to assist him in representing a respondent warden in a federal court habeas corpus proceeding. Rather, when applicable, the section commands the contrary: it is the attorney general who must assist the district attorney.

The District Court had the clear power and duty to cause to allow J. Miller Leavy to appear (under the facts



case), and it is no answer to say it was all right him to appear simply because he did not argue his own imony or because his appearance was purportedly "not ssarily a matter of choice with" him. Leavy obviously ed to appear; if he didn't, he was free to have said If he had, the court certainly would not have forced to.

V THE DISTRICT COURT SHOULD HAVE GRANTED APPELLANT'S MOTION TO MAKE THE STATE OF CALIFORNIA A PARTY-RESPONDENT. APPELLANT DID NOT CALL THE PROSECUTOR, THE SUBSTITUTE REPORTER AND THE TRIAL JUDGE AS ADVERSE WITNESSES; HE WAS NOT ALLOWED TO.

(App. Op. Br. pp. 38-40)

(Resp. Br., Point V, pp. 25-26)

Respondent does not deny that both in fact and in the State was and is the real party in interest in habeas corpus proceeding, but argues that to have filed appellant's motion and hence to have made the State's agents, in addition to the respondent, directly liable to the court "would be a violation of the Thirteenth Amendment of the United States Constitution."

Respondent is mistaken. The case he cites--Elliott endricks, 213 F.2d 922--expressly holds that a habeas corpus proceeding is not a suit against the State. To have joined the State as a respondent, then, would not have made it a party to a suit in any accepted legal nition of that word. It simply would have made it a



to the proceeding, according judicial recognition  
its actual real party in interest status.

When the writ proceeds against the warden he is not  
sued by the petitioner; rather, the petitioner is  
allenging the warden's right to detain him and may ask  
more by way of relief than his release from illegal  
detention. And while the writ does proceed against the  
warden (because he is the custodian and has no right to  
detain the petitioner in violation of petitioner's consti-  
tutional rights), it seldom is the warden who is the State  
alleged to have deprived the petitioner of those  
rights in the first place.

Specifically, in this case, if other State agents  
in the petition had not allegedly deprived appellant  
of his constitutional rights, then appellant could not  
proceed against the warden or maintained that the  
warden, by detaining appellant for execution, was not  
acting beyond his authority as a State officer.

Thus respondent's argument is a truly dubious one.  
It boils down to this: A State's judicial agents and  
officers may contrive to obtain and have upheld on appeal  
a capital conviction in violation of fundamental constitu-  
tional rights, and then be forever free from proper Federal  
judicial intervention simply by having in advance transferred  
the petitioner to the custody of a prison warden in another  
judicial district and then blandly maintain that



do not have to, and cannot be made to, answer  
ctly as a party to any Federal court proceeding.

Such tenuous argument is one arising from convenience  
er than conviction and merits being dismissed as such.  
Respondent's concluding assertion that J. Miller  
y, appellant's prosecutor in the State court, Stanley  
er, the substitute reporter, and the Hon. Charles W.  
ake, the trial judge, were called by appellant as adverse  
esses is just not true, as the record shows, and appellee  
could not impeach his own witnesses, so the point is  
in any sense or to any degree hypothetical.

I RESPONDENT'S SEIZURE AND HOLDING OF APPELLANT'S LITERARY PROPERTY AND HIS REFUSAL TO PERMIT APPELLANT TO HONOR THE CONTRACT ENTERED INTO BETWEEN HIMSELF AND HIS COUNSEL WORKED TO PREVENT APPELLANT FROM PROVING HIS CHARGES, DEPRIVED APPELLANT OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIED APPELLANT THE EFFECTIVE ASSISTANCE OF COUNSEL. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR IN REFUSING TO DECLARE APPELLANT'S RIGHTS ON THESE SUBJECTS.

(App. Op. Br. pp. 40-46)

(Resp. Br., Point VII, pp. 28-29)

Respondent's argument in opposition to this point  
only has no merit. True, "Neither the [State] Director  
orrections nor the State of California were parties  
to the habeas corpus action." But neither were nor are  
they indispensable nor even necessary parties to a con-  
sideration and decision by the District Court of appell-



s application for a declaration of his rights under USC §§ 2201 and 2202, as prayed for (R. 168-169).

It was the respondent warden who had seized appellant's property; he who held and who still holds it in possession; he who did and does refuse to release it. Likewise, it was and is he who refused to permit appellant to honor the contract entered into between appellant and counsel, George T. Davis. It is, moreover, not the persons or motives for his acts that are challenged as depriving appellant of his rights under the Fourteenth Amendment, but the acts themselves. Hence it is apparent that the only necessary party was and is the respondent.

Further, the California Attorney General, counsel for respondent, is also, under State law (Calif. Gov't Code, § 511), counsel for the State and the Director. When the application for declaratory relief was called and denied in the District Court, this counsel stood by and said nothing on the subject of whom he considered proper parties, although he had every opportunity to do so. Having failed to take his objection in the District Court, he may not raise it here for the first time on appeal.

There are several conclusive answers to respondent's contention that "This question [of appellant's rights] should be determined in the State courts."

First. These questions have been adjudicated by the State's courts, including its highest court, and this fact



specifically alleged in the application for declaratory relief (R. 202). State remedies are exhausted. The petition for habeas corpus in the Marin County Superior Court referred to by respondent was filed long before, not after, these proceedings were had in the District Court. It was denied, except that appellant was given the right to send a written assignment of his property rights in the manuscript of the unpublished novel by respondent, and the question of property rights itself was left undecided. In practical effect, no relief was granted (R. 186-188).

As well, the California Supreme Court later denied without opinion a petition for habeas corpus, seeking the relief as was subsequently sought in the application for declaratory relief under 28 USC §§ 2201 and 2202 in District Court (R. 174-193).

Appellant has no further available remedy in the State courts. He is civilly dead (Calif. Pen. Code, § 2602), so is barred from instituting a civil suit in the courts of California.

Second. But there is no comparable provision for civil rights in Federal law. Appellant is resultantly free to sue in whatever relief to which he may be entitled under State law and the 14th Amendment in the Federal courts.

Third. What is ultimately in issue here is not alone a question of State law, or a non-federal determination



the validity of a State prison regulation. It is  
whether the acts of respondent in seizing and holding  
appellant's literary property and refusing to allow  
appellant to honor the contract entered into between him  
and his counsel operate to deprive appellant of his property  
without due process of law and deny him the effective  
assistance of counsel, clearly matters within the juris-  
diction of the District Court. This was demonstrated in  
the opening brief.

Fourth. Federal courts have both the clear power and  
duty to strike down State prison rules which, in their  
application to a State prisoner seeking relief in the  
federal courts, operate to deprive the prisoner of due  
process or equal protection of the law. (Ex parte Hull,  
U.S. 546.)

Appellant does have an enforceable legal right to  
literary property as well as an enforceable legal right  
to honor the contract with his counsel. The cases cited  
against respondent are not in point.

While appellant is civilly dead under State law, he  
expressly retains the right to "mak[e] and acknowledg[e]  
sale or conveyance of property" (Calif. Pen. Code, §  
3). Further, in this State, "No conviction of a crime  
forfeits any forfeiture of any property . . ." (Calif. Pen.  
Code, § 2604). And the Fourteenth Amendment commands that  
the State shall deprive any citizen of his property without



process of law or deny him the right to the effective  
istance of counsel.

II THE RECORD SHOWS, AS A MATTER OF LAW, A  
PERSONAL, CONTINUING AND FIXED BIAS ON  
THE PART OF JUDGE GOODMAN AGAINST APPEL-  
LANT AND IN FAVOR OF THE STATE OF CALI-  
FORNIA.

A. THE AFFIDAVIT OF DISQUALIFICATION WAS  
SUFFICIENT.

(App. Op. Br. pp. 47-50)

(Resp. Br., Point Vi, pp. 26-28)

Respondent claims that "the district judge correctly  
d that the allegations of the affidavit were insuf-  
ficient to show personal bias and prejudice." But a  
wing of the affidavit (R. 101-118) shows that it was  
ed on far, far more than, as respondent claims, "a  
opinion of the judge on a matter of law and an ad-  
e prior ruling." It was based on the angry and intem-  
perate language of Judge Goodman's opinion in Chessman v.  
Is, 128 F.Supp. 600, on the evident personal hostility  
icit therein, on the public hysteria that opinion pro-  
d; on the judge's repeated complaints that the case  
before him; on his reference to his court as a laundry;  
his unkept promises to change appellant's custody; on  
refusal to grant appellant adequate time or opportunity  
repare and present his case, etc., as set out in the  
ing brief, and as fortified by his widely publicized  
epts to have the habeas corpus law changed and shut



ellant out of Federal court, his conduct of and com-  
ts during the actual hearings, and his statement that  
didn't care what the Supreme Court intended, he was  
ng to proceed in his own way, etc.

In such a fact setting appellant again submits that  
point should be controlled and tested by the stand-  
s fixed by the Supreme Court in the cases of In re  
chinson, 349 U.S. 133, 136, and Berger v. United States,  
U.S. 22.

Appellant has another case, Knapp v. Kinsey, 232 F.2d  
, which he believes is squarely in point. There the  
h Circuit stated and held (p. 466):

" . . . When the remarks of the judge during the  
course of a trial, or his manner of handling the  
trial, clearly indicate a hostility to one of the  
parties, or an unwarranted prejudgment of the  
merits of the case, or an alignment on the part  
of the Court with one of the parties for the pur-  
pose of furthering or supporting the contentions  
of such party, the judge indicates, whether con-  
sciously or not, a personal bias and prejudice  
which renders invalid any resulting judgment in  
favor of the party so favored. (Citations.) . . .

" . . . the conduct of the District Judge did not  
conform to the standard required by the foregoing  
authorities. Whether consciously or otherwise,  
he failed from the start of the trial to view this  
case with the impartiality between litigants that  
the defendants were entitled to receive. His  
active participation in the case and in the ques-  
tioning of witnesses exceeded what was reasonably  
necessary to obtain a clear understanding of what  
their testimony was and fully justifies appellants'  
complaint that at times 'he, figuratively speaking,  
stepped down from the bench to assume the role of  
advocate for the plaintiff.' Although appellees'  
counsel did not ask or need such assistance, and



apparently at times realized the possible prejudice to their case, the prejudicial effect to appellants' rights requires a reversal of the judgment. (Citations.)"

judgment was reversed and the case remanded for re-  
l before another judge. The interests of justice  
for a like decision in this case.

B. THE AFFIDAVIT OF DISQUALIFICATION WAS  
TIMELY; ON ITS FILING, JUDGE GOODMAN  
SHOULD HAVE DISQUALIFIED HIMSELF.

(App. Op. Br. p. 51)

(Resp. Br., Point VI, pp. 26-28)

Respondent argues that appellant's affidavit of disqualification was not timely. He cites 28 USC § 144 in and then points out that the affidavit was not filed 1 December 29, 1955, which was 29 days, to quote respondent, "after petitioner was expressly informed that Judge Goodman would handle the matter and approximately 11 days [actually 12 days] prior to the time then set for trial [but actually 18 days before the hearings got underway]."

First. 28 USC § 138 provides that "The times for holding terms of court shall be determined by rule of the District court." And by rule the District Court for this District has provided that "Terms of this Court shall be at San Francisco commencing on the first Monday in April, the second Monday in July and the first Monday in November of each year."



Thus, since the term during which appellant's habeas corpus hearing was held began on the first Monday in November, 1955 and did not end until early March, 1956, since the Supreme Court's mandate did not come down until November 28, 1955 (several days after the term had begun), and since hearings were concluded and the decision rendered weeks before the term ended, appellant could not possibly have filed his affidavit "not less than ten days before the beginning of the term at which the proceeding[s] to be heard."

In this context, court terms are simply an irrelevant fiction, "and the difficulty with fictions is that those who are most apt to mislead are those who proclaim them." (Justice Jackson in a separate opinion in Brown v. Board of Education, 344 U.S. 443, 542.)

Second. Appellant filed his affidavit at the earliest possible and practicable time. True, appellant learned that Judge Goodman would be the hearing judge on November 1955--and, through counsel, immediately objected in writing to the assignment (PTR. 2-6). On this same date, Judge Goodman flatly rejected counsel for appellant's suggestion he voluntarily disqualify himself and stated he then was not prejudiced (PTR. 7-13, 19-20).

Appellant accepted the refusal and the statement. What else could he do? To have filed an affidavit in the face of both would have been a futile act. It would,



ther, have foreclosed appellant from seeking Judge  
dman's disqualification at some future date should it  
ear the judge still entertained the bias appellant  
ieved he had shown in the past, since the statute  
mits "A party [to] file only one such affidavit as  
any judge."

As soon as it became apparent to appellant that  
ge Goodman still did entertain a personal, continuing  
fixed bias and prejudice against him, and it further  
ared that the facts of record were sufficient to  
blish that bias and prejudice as a matter of law,  
llant immediately prepared and filed his affidavit.  
t he set out all the relevant facts. Therefore,  
ponent's argument that the affidavit was not timely  
a quibble.

Third. It is not, as respondent claims, "appellant's  
ention that [without more] the judge against whom  
affidavit of bias or prejudice is filed must permit  
her judge to pass on the sufficiency of the affidavit."

It is appellant's contention, as demonstrated under  
t VII-A just above and in the opening brief, that the  
davit more than sufficiently showed as a matter of  
the bias denounced by 28 USC § 144, and hence that,  
andatorily required by law in such a situation, Judge  
dman should have proceeded no further, and another judge  
ld have been assigned to hear the proceeding.



As noted, no counter-affidavit was filed; the facts not disputed. Respondent significantly does not agree with appellant's statement in the opening brief that "disqualification, further, would not have interfered with the regular hearing and disposition of the case."

The point is not academic or the prejudice suffered by appellant slight by the failure of Judge Goodman to qualify himself. That failure deprived appellant of the most fundamental right demanded by our system of jurisprudence: the right of the litigant to have his case heard by an impartial judge. (In re Murchinson, 2 U.S. 133, 136.)



There is nothing to be found in Respondent's Brief  
that dictates appellant should or must retreat from  
position that, for those reasons specified and argued  
in his opening brief and here, this Honorable Court  
should reverse the order and judgment of the District  
Court -- discharging the writ and remanding appellant to  
custody -- with appropriate directions either to dis-  
charge appellant from custody, or to hold full and fair  
hearings on appellant's charges.

WHEREFORE, this alternative relief, as prayed for  
on pages 52-53 of Appellant's Opening Brief, should be  
granted.

Dated: July 23, 1956.

Respectfully submitted,

GEORGE T. DAVIS

ROSLIE S. ASHER  
98 Post Street  
San Francisco 4, California

Attorneys for Appellant, and

CARYL CHESSMAN  
Box 66565  
San Quentin, California

In Propria Persona

